

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 526859 AND MERCHANT MARINER'S DOCUMENT Z-1201137
ISSUED to: William J. Frappier

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2302

William J. Frappier

This appeal was taken in accordance with Title 46 United States Code 239(g) and 46 CFR 5.30-1.

By order dated 26 January 1982, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts suspended Appellant's license for one month, on twelve months' probation, upon finding him guilty of misconduct and negligence. The specification found proved under the charge of misconduct alleges that, while serving as Master on board the United States M/V BERT REINAUER II, O. N. 236989, under authority of the license above captioned, on or about 18 May 1981, Appellant did wrongfully fail to report a marine casualty to the nearest Officer in Charge, Marine Inspection as required by 46 USC 239 and 46 CFR 4.05-10.

The specification found proved under the charge of negligence alleges that Appellant, while so serving as Master on board the M/V BERT REINAUER II, O. N. 236989, did, on or about 18 May 1981, fail to navigate said vessel with due caution, causing said vessel to ground in the Penobscot River, Maine.

The hearing was held at Portland, Maine and Boston, Massachusetts on 28 October 1981 and 9 November 1981.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to each charge and each specification.

The Investigating Officer introduced in evidence the testimony of Mr. Robert L. Webster, Chief Engineer aboard the M/V BERT REINAUER II, Mr. John F. Curry, General Manager of Boston Fuel Transportation, Inc., and 15 exhibits.

In defense, Appellant offered in evidence his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charges and specifications had been proved. He then served a written order on Appellant suspending License No. 526859 issued to Appellant for a

period of 1 month on 12 months' probation.

The entire decision was served on 29 January 1982. Notice of Appeal was timely filed on 24 February 1982 and perfected on 2 July 1982.

FINDINGS OF FACT

On 18 May 1981, Appellant was serving as master on board the United States M/V BERT REINAUER II and acting under authority of his license while the vessel was underway in the Penobscot River, Maine.

The M/V BERT REINAUER II, O. N. 236989, is a steel-hulled tankship 287 feet in length. The vessel has five cargo tanks numbered one to five fore to aft, and transversely divided into three watertight compartments for each numbered cargo tank. The vessel was equipped with a digital fathometer and a two-way marine radio system which were working properly. It is operated by Boston Fuel Transportation, Inc. (BFT)

On 18 May 1981 Robert L. Webster was serving as Chief Engineer aboard the M/V BERT REINAUER II as she transited the Penobscot River, Maine, with a cargo of 13,948 bbls. kerosene and 8,986 bbls. of non-leaded gasoline, which had been loaded at the Exxon Terminal, Everett, Ma. The gasoline, which was being carried in tanks nos. 3 and 5 across, was destined for the Webber Oil Co., Bucksport. The kerosene, which was being carried in tanks nos. 1, 2, and 4 across, was destined for Wegger Oil Co., Bangor. Bucksport is downriver from Bangor. However, Appellant decided to deliver the Bangor cargo first because there was a barge tied up at the Webber facility in Bucksport. After completion of the discharge at Bangor he intended to return to Bucksport and discharge the remainder of the cargo.

After the kerosene had been discharged at Bangor, Appellant was unable to sail the vessel back down river because the tide reduced the charted depth of the water to 13 feet just below the Webber facility at Bangor and the vessel had a draft of 14 feet 6 inches aft. Appellant also knew that he could not keep the vessel at Bangor because the charted depth of water alongside the dock was only 11 feet at mean low water. Appellant knew, from word of mouth, of an uncharted shallow spot in the river between the Webber dock at Bangor and the High Head dock. It had a reported depth of about 13 feet at MLW. Low water at Bangor occurred at 1757 on 18 May 1981, and was 1 foot above MLW.

Appellant decided to move the vessel to the High Head dock to await high tide. At about 1730, during the transit, the vessel grounded. Chief Engineer Webster, who was in the mess room felt

the vessel shudder and lurch, so he immediately went below to the engine room to check for damage and leakage. He found none. He testified that while in the engine room he heard the clutches connecting the engine and shaft disengage. The vessel did not stop but continued to move through the water. Appellant, who was operation the vessel at the time filed a master's protest with BFT on 15 June in which he states that he allowed the vessel to drift until the fathometer showed a greater depth of water. It was daylight at the time, the weather was clear, and visibility was good.

Upon arrival at High Head, Appellant checked the vessel and found no apparent damage. He reported the incident to his superiors by telephone.

The vessel remained in service until 15 Jun (except for three days lay-up) when Mr. Vincent Tibbits, Vice President of BFT, observed a bent propeller, as the vessel lay at the pier in Boston. On 23 July 1981 the vessel was placed in a drydock where a survey was made. All blades of the starboard propeller were found to be bent, torn, and distorted. The starboard rudder stock were found to be heavily bent aft.

The casualty was not reported to the Coast Guard by either Appellant or any representative of BFT until after the damage had been found on drydocking and after Mr. J. F. Curry, General Manager of BFT, was requested to do so by the Coast Guard Marine Inspection Office at the port of New York.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. In general Appellant contends that:

I. The finding by Judge O'Malley that he failed to navigate the M/V BERT REINAUER II on 18 May 1981 with due caution, and permitted the vessel to ground in the Penobscot River, Maine is not supported by substantial evidence and is clearly erroneous. In support of this Appellant asserts:

a. The grounding is not established because the exact location of the grounding was not shown.

b. The grounding is not established because the shudder felt by those aboard the vessel is consistent with striking a submerged object as well as grounding.

c. The grounding is not established because the condition of the bottom of the vessel before and after

the incident on 18 May was not shown.

d. The grounding is disproved because the hull of the vessel was not damaged.

e. The negligence of Appellant was not proved because there was no testimony to establish what a prudent master of a vessel would do under similar circumstances.

f. Since the Investigating Officer only argued for a finding based on a presumption of negligence, accompanying the grounding, the Administrative Law Judge erred in finding the charge and specification proved apart from that theory.

II. The decision by Judge O'Malley that the Appellant failed to report a marine casualty to the nearest officer in Charge, Marine Inspection as required by 46 CFR 4.05-10 is not supported by substantial evidence and is clearly erroneous. In support of this Appellant asserts:

a. The Administrative Law Judge erred in relying on 33 U.S.C. 361 and Commandant Decision on Appeal 727 (RAPPEL) since they were not argued by the Investigating Officer.

b. Appellant was not required to report the casualty because he did not have the necessary forms aboard the vessel and because he properly relied on his superior in BFT to make the report.

c. Appellant was not required to make the report in person because there was no Officer in Charge, Marine Inspection in Bangor Maine.

d. Appellant was not required to make the report because the damage was not found until 15 June 1981 and the monetary amount was not known until even later.

III. The rulings by Judge O'Malley on the motions to dismiss for lack of substantial evidence at the conclusion of the Investigating Officer's case were in error and extremely prejudicial to the defense of Appellant's action. In support of this basis Appellant relies on the grounds listed under I and II above.

Many of the issues in this appeal center around whether or not the Administrative Law Judge's finding that the M/V BERT REINAUER II grounded on 18 May 1981 is adequately supported by the evidence. Therefore if is considered separately before the individual points

raised by Appellant.

In considering this question it must be kept in mind that:

"It is the function of the judge to evaluate the credibility of witnesses in determining what version of events under consideration is correct. Commandant's Appeal Decision 2097(TODD). The question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently incredible, his findings will not be set aside on appeal. O'Kon v. Roland 247 F. Supp. 743 (S.D.N.Y. 1965)."

Commandant's Appeal Decision 2116 (BAGGETT). See also Commandant's Appeal Decisions 2099 (HOLDER) AND 2108 (ROYSE).

During the Investigating Officer's case in chief, the testimony of Chief Engineer Robert L. Webster, the testimony of Mr. John F. Curry, and several exhibits were presented. Chief Webster was aboard the vessel and felt it shudder at about 1730 on 18 May 1981. When he went to the engine room to check for damage he heard the clutches connecting the engine to the shaft disengage. He stated that from his experience it felt as if the vessel had either grounded or struck something. He was also aboard the vessel when she was put in drydock in July and testified to the damage to the propellers, rudder, and rudder stock. He stated that the damage was consistent with either grounding of the vessel or striking a submerged object. Mr. Curry's testimony was used to introduce the master's protest regarding the incident of 18 May. This is a document signed and sworn before a notary. It was signed on 15 June 1981 by Captain Frappier, before the vessel was drydocked and before the Coast Guard investigation of the incident was begun. In the protest Captain Frappier states in part:

"...at 1730 hrs, vessel was felt to touch bottom in area of MLW 13-ft spot (limits indeterminate by chart) Penobscot River.... (Engine stopped to drift until dept [sic] increased (by fathometer) Damage to the starboard wheel, rudder and rudder stock was observed. Bottom damage unknown."

The evidence is that the shudder and the damage were both equally consistent with either grounding or striking of a striking of a submerged object. There is also evidence that floating debris was common in the area. These facts alone would not support the finding that the vessel had grounded. However, in the protest signed on 15 June 1981, Appellant states not only his opinion that the vessel touched bottom, but also that he stopped the engine after the shudder to drift until the depth increased as shown by the fathometer. His reported action contains the inescapable

inference that the fathometer, immediately after the shudder, showed dangerously little water beneath the vessel. This establishes that the cause of the shudder and the damage discovered later was, in all probability, the vessel striking the bottom. It supports the Administrative Law Judge's finding that the vessel grounded at about 1730 on 18 May 1981.

I

In connection with the first basis of appeal, Appellant complains that the location of the grounding was not adequately shown. The location was established as between the Webber and High Head docks in the vicinity of Bangor Maine on the Penobscot River. These docks are about 700 yards apart. This sufficiently described the location of preparation of Appellant's defense. A more exact location is not necessary to establish that the vessel grounded. To establish the position more exactly would require that an accurate fix be taken at the time of the grounding. So far as the evidence shows this was not done and the Appellant was the only one in the wheel house in a position to do so. He could not be called as a witness against himself. NOAA Chart 13309 show the river and the depths of the water between these docks. To require the exact location of the grounding under these circumstances would place an impossible and unreasonable burden on the Investigating Officer and add little or no certainty to the fact of the grounding. The Judge did not err in failing to require the Investigation Officer to produce such evidence.

Appellant's assertion that grounding is not established because the shudder felt by the Chief Engineer was also consistent with striking a submerged object ignores Appellant's own statements in the master's protest. It is without merit. As discussed above the finding that the vessel grounded is adequately supported.

Appellant's assertion that the lack of evidence regarding the condition of the bottom of the vessel, before and after the incident, precludes a finding that the vessel grounded, is also without merit. There is no indication in the record that inspections of the bottom had been made at these times and that such information was available. In addition, the existence of bottom damage is only evidence of a grounding to be considered by the Judge. Such damage is not an either charge or specification. Lack of such evidence does not preclude the Judge's findings.

Appellant next asserts that the lack of damage to the hull of the vessel establishes that the vessel did not ground. Appellant's theory is that, due to the draft of the vessel and reported depth of water at the shallow spot, the bottom of the hull would have been damaged for a considerable distance ahead of the rudders and

propellers if the vessel had grounded.

The exact nature of the shallow spot and manner in which the vessel encountered it are not shown by the evidence. Appellant does not cite, and I am unable to find, evidence in the record that the configuration of the bottom of the vessel was such that, with the vessel trimmed as she was at the time of the incident, the hull would have struck bottom if the propeller and rudder did. Therefore, it cannot be said with any degree of certainty that the bottom of the hull would have been damaged if the vessel had grounded on the shallow spot. The fact that only a propeller and rudder were damaged and that no damage to the bottom of the hull was found upon drydocking does not, of necessity, require a finding that vessel did not ground. This was a matter to be considered by the Judge along with all of the other evidence. The Administrative Law Judge's determination in this regard will not be disturbed.

Appellant next asserts that the testimony of an expert is needed to establish what a prudent master of a vessel would do under the circumstances in which Appellant found himself. A further discussion of the evidence is helpful in connection with this contention.

During the Appellant's case he testified that the vessel was navigated on a certain course over water of sufficient charted depth between the docks and indicated the course he followed on a chart of the vicinity. He also testified that he had been told previously that there was a shallow spot of about 13 feet which was not shown on the chart. This shallow spot was somewhere above the Webber dock at Bangor. It is interesting to note that the depth of water at this shallow spot was supposedly the same as the shallow spots downstream which prevented the vessel from proceeding to Bucksport after unloading at Bangor.

The Administrative Law Judge found that Captain Frappier, the Appellant "...was negligent in remaining at the Webber dock until the tide ran out on him." The evidence shows that the charted depth of water down stream from this dock was not sufficient for his vessel to pass at low water; the charted depth of the water at the dock was not sufficient for the vessel to remain there at low water; and Appellant knew that the water above the dock had an uncharted shallow area of about the same depth as the water down stream. He, nevertheless, chose to remain at the Webber dock, unloading cargo, until nearly low water. At that time he attempted to move his vessel up river, past the known shallow spot to a deeper berth.

Appellant, no doubt, made the best choice possible after unloading cargo. However, I do not believe a prudent master would

allow his vessel to be trapped, as happened here, by being left by the tide in water of insufficient depth. The height of tides can be easily and accurately forecast from the published tide tables. An expert's testimony is not needed to establish that the prudent master of a vessel must consider the state of the tide in planning a voyage in shallow waters. The master of a vessel is expected to know the state of the tide and characteristics of his vessel. See Commandant's Decision on Appeal 2272 (PITTS).

Appellant's assertion that Commandant's Decision on Appeal 2080 (FULTON) requires expert testimony regarding the standard of care to which a master shall be held with respect to tidal conditions is without merit. In Fulton the issue was whether it was prudent to navigate a vessel with a temporary power source for the steering up the Delaware River without the assistance of tugs under certain very specific circumstances. All of the evidence in the record supported the Appellant's position that the power source was reliable and that the passage could be completed safely. The holding in Fulton does not require expert testimony to establish to establish a standard of care when, as here, that standard has been announced in earlier decisions and is readily apparent from the customary principles of good seamanship and common sense.

The M/V BERT REINAUER II grounded because Appellant failed to make proper use of knowledge concerning the tides and depth of water which he, as master of a vessel, was expected to have. I do not believe that expert testimony is necessary to find this to be negligence.

The assertion that the Judge erred in basing his findings of negligence on a theory other than the presumption of negligence argued by the Investigating Officer is without merit.

The presumption of negligence accompanying the grounding is not extinguished when evidence is introduced to establish acts of negligence. It is only "[w]hen persuasive evidence to the contrary is introduced, the occasion for the presumptions, as rules of law, is gone, and they simply cease to exist." W. PROSSER, THE LAW OF TORTS §38 (4th Ed. 1971), as quoted in Commandant's Appeal Decision 2177 (HOMER). Here the Judge did not find Appellant's evidence to the contrary persuasive and could have based his finding on the presumption.

Had the Appellant's evidence to the contrary been persuasive and rebutted the presumption, the government would still have been entitled to introduce evidence of specific acts of negligence leading to the grounding and the Judge could then have based a finding of negligence on those specific acts.

Here the Judge chose to base his findings on specific acts of negligence even though the presumption was not rebutted. This, in itself, is not cause to set aside his findings. However, his findings must be judged apart from the presumption. As discussed above they are supported.

II

Appellant's argument that the Judge should not have considered 33 USC 361 and Commandant's Decision on Appeal 727 (RAPPEL) in connection with the charge and specification alleging misconduct because they were not argued is without merit. The Administrative Law Judge was not precluded from considering statutes or precedents because the Investigating Officer failed to argue them. He was bound to apply the law whether it was argued or not.

The fact that forms for reporting the casualty were not present aboard the vessel, the fact that Appellant reported the incident to his superiors and relied on them to report to the Coast Guard, and the fact that there was no Coast Guard Marine Inspection Office in Bangor, Maine do not excuse the Appellant's failure to make the required report. The record indicates that the report was not filed until over 2 months after the casualty. There is no indication that Appellant made any effort to obtain the forms or otherwise convey information about the incident to the Coast Guard. Relying on his superiors to make the report did not relieve Appellant of the responsibility to insure that it was made. Commandant's Decisions on Appeal 727 (RAPPEL) and 1283 (SOLFRANK). The fact there was no Officer in Charge, Marine Inspection in Bangor only relieved Appellant from making the report in person. He was still required to make it in writing by 46 CFR 49.5-10.

The fact that damage to the vessel was not discovered and evaluated until considerably after the grounding does not help Appellant. The requirement for the report is based on the grounding rather than the damage in this case. See 46 CFR 4.05-1(a).

III

At the end of the Investigating Officer's case the evidence showed a grounding in the vicinity of a charted channel between the Webber dock and the High Head dock in the Penobscot River at Bangor Maine. The evidence also showed that Appellant was the master of the vessel and on the bridge at the time and that no report of the casualty was made to the Coast Guard until Jul 1981. This is sufficient to raise the presumption of negligence associated with a grounding and to constitute substantial evidence of misconduct for failure to report the casualty. Therefore, the Administrative

Law Judge did not err in denying Appellant's motions to dismiss at the end the Investigation Officer's case.

CONCLUSION

The findings of the Administrative Law Judge are supported by the evidence and are correct in law.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts on 26 January 1982, is AFFIRMED

B. L. STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C., this 20th day of April 1983